

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2 FOR THE COUNTY OF MULTNOMAH  
3 THE ESTATE OF MICHELLE )  
SCHWARZ, deceased, by and )  
4 through her Personal )  
Representative, RICHARD )  
5 SCHWARZ, )  
)  
6 Plaintiff, ) Circuit Court  
) Case No. 0002-01376  
7 vs. )  
)  
8 PHILIP MORRIS INCORPORATED, ) Appellate Case  
a foreign corporation, and ) No. A118589  
9 ROTHS I.G.A. FOODLINER, )  
INCORPORATED, an Oregon )  
10 corporation, )  
Defendant. )  
11  
12 TRANSCRIPT OF PROCEEDINGS  
Volume 45-C  
13 3:20 p.m. - 5:10 p.m.  
14  
15 BE IT REMEMBERED, That the above-entitled  
16 matter came on regularly for Jury Trial and was  
17 heard before the Honorable Roosevelt Robinson, Judge  
18 of the Circuit Court of the County of Multnomah,  
19 State of Oregon, commencing at 3:20 p.m., Thursday,  
20 March 14, 2002.  
21 \* \* \*  
22 Katie Bradford, CSR 90-0148  
Official Court Reporter  
23 210-A Multnomah County Courthouse  
1021 SW Fourth Avenue  
24 Portland, Oregon 97204  
(503) 988-3549  
25

2

1 APPEARANCES:  
2 Mr. D. Lawrence Wobbrock, Attorney at Law,  
Mr. Charles S. Tauman, Attorney at Law,  
3 Mr. Richard A. Lane, Attorney at Law,  
Appearing on behalf of the Plaintiff;  
4  
5 Mr. James L. Dumas, Attorney at Law,  
Mr. Jay W. Beattie, Attorney at Law,  
6 Mr. John W. Phillips, Attorney at Law,  
Appearing on behalf of Defendant  
7 Philip Morris, Incorporated and Defendant  
Roths I.G.A. Foodliner, Incorporated.  
8  
9 \* \* \*

21  
22  
23  
24  
25

Index  
GENERAL INDEX  
VOLUME 45-C

3

	Page No.
March 14, 2002	
3:20 p.m.-5:10 p.m. Proceedings	4
Plaintiff's Closing Argument (continuting)	5
by Mr. Wobbrock	
Colloquy, re: Jury Instructions	67
Reporter's Certificate	75

9

\* \* \*

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

4

(Thursday, March 14, 2002, 3:20 p.m.)  
P R O C E E D I N G S  
(Court Reporter Charlotte A. Powers  
reported Volume 45-B.)  
(Whereupon, the following proceedings were  
held in open court, out of the presence of the  
jury:)  
THE COURT: All right. Thank you.  
Bring the jury and let us resume, please.  
THE COURT: Since you're doing a lot of  
speaking, counsel, I may somewhere in there take a  
10-minute break and come back and start up again.  
MR. WOBBROCK: So I understand,  
Your Honor, if we don't finish, it is not going to  
prejudice me or my client. I can finish tomorrow?  
THE COURT: Absolutely. Absolutely not I  
am supposed to say.  
MR. PHILLIPS: I preferred your other  
version. I think we all have a mutual interest in  
trying to get this case to the jury by tomorrow.  
(The following proceedings were held in  
open court, the jury being present at 3:25 p.m.:)  
THE COURT: All right. Thank you.  
Counsel, you may resume, please.  
MR. WOBBROCK: Thank you, Your Honor.  
Plaintiff's Closing Argument  
CLOSING ARGUMENT  
(continuing)

5

2  
3 BY MR. WOBBROCK:

4 I am just going to jump back to something  
5 we showed you earlier just for a moment because I  
6 know it's going to be discussed in great length, a  
7 little bit more in our case and also in the defense  
8 case, and this is back to the front and the shield  
9 idea of the CTR.

10 Exhibit 187, this is the one we showed you  
11 earlier just a few minutes ago. And it talks about  
12 it was set up as an industry shield, Bill Shinn  
13 feels that "special projects" are the best way  
14 monies are spent. You'll see from some of the  
15 exhibits when you look at the special projects,  
16 special projects are projects that were done by  
17 lawyers that were kept in a separate fund.

18 And I'll try and get the exact number of  
19 that exhibit for you, in a separate fund. These  
20 were sensitive projects that could lead to the  
21 conclusion that smoking caused cancer or that  
22 smoking was addictive, and these kinds of projects  
23 were governed totally by the lawyers.

24 You're going to see a whole bunch of  
25 documents that the defense has put in about CTR and

Plaintiff's Closing Argument

6

1 they're going to try and convince you that CTR was  
2 engaged in legitimate, scientific medical research,  
3 but you heard Dr. Whelan. Remember Dr. Whelan by  
4 deposition? CTR's research was just camouflage. It  
5 was just for show.

6 There had to be some minor legitimacy to  
7 it because a front has to have something that looks  
8 real, but, in fact, it was a shield. And the shield  
9 was we're doing something and we're going to get to  
10 the bottom of it, just give us some more time. It  
11 is 50 years later, and they haven't gotten there,  
12 and there was no intention of getting there.

13 The secret projects which could have  
14 gotten them there were secret projects funded from a  
15 separate fund by the lawyers, and I will give you  
16 that number hopefully before I finish off that  
17 particular exhibit, but it's in the exhibit set.

18 All right. So keep in mind that CTR  
19 research is something they're proud of in the public  
20 in the light of day, but when they think no one is  
21 watching and they're candid, they admit it's a front  
22 and a shield. That's the important thing. And  
23 that's Exhibit 187 for your later review.

24 That's what Philip Morris said when they  
25 thought no one was watching. All right. Let's go

Plaintiff's Closing Argument

7

1 way back five weeks. Remember these concepts? I  
2 saw you taking very careful notes and it was really  
3 a pleasure to present this evidence because it was  
4 all new, all new to many of us, and when we talk  
5 about friendly familiarity, remember that concept?

6 You see the Marlboro tent around every  
7 corner. You walk into a convenience store and there  
8 is the Marlboro tent. They call it the Marlboro  
9 tent in the business of selling cigarettes, but  
10 friendly familiarity and crosselasticity, these are  
11 what make it seem that it's a normal, reasonable  
12 conduct to smoke, because it's everywhere.

13                   It's everywhere and it's not surprising  
14                   it's everywhere because it's five billion dollars  
15                   just for Philip Morris to spread the word in  
16                   promotion, in advertising, that's what they're  
17                   spending. That's \$100 million a week and there is  
18                   no TV now and they are still spending that much.  
19                   So these concepts of crosselasticity, even  
20                   though you don't see a Merit cigarette advertised,  
21                   you see a Marlboro cigarette advertised or even a  
22                   Vantage cigarette or a low-tar cigarette, you say,  
23                   well, low-tar cigarette in another company must not  
24                   be such a bad idea to smoke. Low-tar cigarettes  
25                   must have some advantage.

Plaintiff's Closing Argument

8

1                   You saw that one ad that says, "If you  
2                   think about quitting, think about low tar." It's a  
3                   reasonable alternative. And all that information  
4                   environment is feeding off of each other and that's  
5                   why the advertising of other companies is relevant  
6                   in this case, okay? Not to say that it is the basis  
7                   of liability, but relevant to show why she picked up  
8                   the habit after being told as a youngster by her  
9                   mother, "Don't smoke."

10                   And we talked to Dr. Burns, "What happens  
11                   over the years? Why does someone end up wanting to  
12                   pick up cigarettes after being told at eight, 'Don't  
13                   smoke, it's bad for you,' at age 18, all of a sudden  
14                   things change." We talked about that earlier, about  
15                   the appeal of being your own person and the  
16                   susceptibility of advertising and young people and  
17                   the belief that you'll live forever, all of which  
18                   they knew.

19                   Associative ads and explicit ads, those  
20                   were concepts that perhaps we found kind of  
21                   interesting. The messages, the subliminal messages  
22                   of people on sailboats and hiking in the woods, and  
23                   doing all these things, going down a river in a  
24                   raft. We have all these ads in a binder, by the  
25                   way. Going down a river in a raft. Never any smoke

Plaintiff's Closing Argument

9

1                   anywhere in the picture.

2                   These are all associated with healthful  
3                   activities. In fact, the message is it isn't so  
4                   bad. And at age 16, 17, with all the other messages  
5                   going on, that's what people pick up and that's what  
6                   Michelle Schwarz picked up. And then she bought  
7                   these cigarettes, Benson & Hedges that cost about a  
8                   nickel more a pack, because she thought maybe  
9                   they're a cut above, maybe they're quality.

10                   Probably something going on in there  
11                   about, maybe they're not so bad, but that is just  
12                   speculation, but they're quality. You paid a nickel  
13                   more back then. And that was a regular-tar  
14                   cigarette, a regular-delivery cigarette. I guess  
15                   Dr. Carchman called it a full-flavored cigarette, 16  
16                   milligrams tar, 1 milligram nicotine. We are going  
17                   to see a little bit more about that when we get  
18                   further into the evidence.

19                   Okay. Back then, as we look at these  
20                   concepts of advertising, we know that doctors  
21                   smoked, Ben Casey on TV. Doctors when she went to  
22                   nursing school were smoking all around her. The  
23                   nurses were smoking. We saw all those ads, Joe

24 DiMaggio and Sam Sneed and swimmers and everybody  
25 else smoking, athletes smoking.

Plaintiff's Closing Argument

10

1 People that are athletes now, wouldn't  
2 even consider it, but back then, they were a little  
3 less sophisticated and people bought into that. And  
4 actors on TV. There is no doubt about it that  
5 Philip Morris was interested in what young people  
6 thought about this. Here is one of those that shows  
7 that they went way down and asked questions.

8 This is 1973, Exhibit 353. In March 1973,  
9 Opinion Research Corporation conducted a national  
10 probability sample among 2,060 respondents 18 years  
11 of age and over in which they asked two questions  
12 for us, "Do you smoke cigarettes, that is, at least  
13 a pack a week? And if yes, about how many  
14 cigarettes do you usually smoke per day now? In  
15 addition, these same questions were asked of a  
16 national probability sample of 452 teenagers, age 12  
17 to 17." And here is the line, "Percentage that  
18 smoke."

19 They were intensely interested and studied  
20 so they could fashion their message to people like  
21 Michelle Schwarz. They were intensely interested in  
22 children and what they saw when they gave those  
23 messages about smoking. And what did they know  
24 about smoking? Let's see if we can move on.

25 Well, here are some exhibit numbers for

Plaintiff's Closing Argument

11

1 you, and we'll go back to 1958 and 1959, and  
2 Exhibits 20 and 308. But there are also later  
3 times, 38, 53 and 220. If you look at these  
4 exhibits, you see, for example, the English survey  
5 exhibit.

6 This is when some scientists came over in  
7 April and May of 1958, and did a survey of what was  
8 going on in the country, and talked to a whole bunch  
9 of people. Here is their itinerary. You can see  
10 where they went. This is exhibit, by the way, 20.

11 And they went to TIRC, Tobacco Industry  
12 Research Committee twice -- actually three times and  
13 to Philip Morris. And they reported here -- and  
14 because of the time, I am not going to read this for  
15 you, but you can read it. It basically said, "If  
16 you mean has causation been established meaning a  
17 change of events that leads finally to lung cancer,  
18 yes, it has. And the people we interviewed  
19 overwhelmingly believe that."

20 And some of those people they interviewed,  
21 the places they stopped were Philip Morris and the  
22 Tobacco Industry Research Committee, their agent.  
23 But then a fellow that we've seen on videotape  
24 twice, and you've heard his deposition read in which  
25 he didn't know a lot about a lot of exhibits,

Plaintiff's Closing Argument

12

1 remember that? Dr. Wakeham, the fellow we called  
2 him the applesauce doctor, "I don't know too many  
3 people dying of applesauce." Remember that? And  
4 that's what the interviewer said. And he said,  
5 "Well, they're not eating that much of it."

6 This is what he wrote back in 1959.  
7 "Cancer researchers now, I believe, generally agree  
8 that lung cancer is the end stage of a series of

9 sequential changes." That was within the walls  
10 of -- inside the walls of Philip Morris. What would  
11 have happened if they had come clean then?

12 What would have happened if before  
13 Michelle Schwarz started to smoke when they knew  
14 they had come clean and said, "You know, this is  
15 dangerous, addictive and it's going to kill you, and  
16 we're not going to make it look glamorous. We're  
17 not going to show people rafting or sports figures,  
18 because that doesn't make any sense. We're going to  
19 tell you the truth."

20 Fifteen million deaths later things would  
21 have been quite different. And when we talked to  
22 Dr. Carchman, remember, I said, "Dr. Carchman, if  
23 you would have spend as much effort to get out the  
24 word about low-tar cigarettes, that they're not  
25 really low tar, and to study the carcinogenicity of

Plaintiff's Closing Argument

13

1 tobacco 40 years ago, where would we be today?  
2 Where would we be today?"

3 And he said, "We'd probably" -- my  
4 recollection -- "We'd probably be ahead of where we  
5 are now." But instead, creating doubt without  
6 denying, putting up a shield and a front, and trying  
7 to put one over on the American people. Fifteen  
8 million premature deaths later, that's where we are.  
9 And billions of dollars in the bank accounts of  
10 Philip Morris people.

11 And what do they spend their effort really  
12 researching? What did they really want to do? They  
13 wanted to find ways to make their product more  
14 addictive. So I've added a few notes based upon the  
15 evidence that as those lawyers say, "Adduced at  
16 trial." I don't know why lawyers talk that way, but  
17 this is the evidence that was put on at trial.

18 This is about addiction. We're down to  
19 Item 4 over there on the chart there. Some of the  
20 evidence that was presented to you by Dr. Benowitz,  
21 Dr. Burns and Dr. Resnik, "Addiction affects the  
22 ability to choose." PM and the lawyers knew.  
23 Remember Exhibit 206? They know that. They said,  
24 "Don't ever study that, don't admit it. It takes  
25 away our defense of choice," which you are going to

Plaintiff's Closing Argument

14

1 hear probably 15 times from the lawyers after I sit  
2 down. "She chose, she chose, she chose."

3 That's not the end of the case. Remember,  
4 the family has accepted responsibility. That's the  
5 beginning of the case because what is their  
6 responsibility? Is it all her? And when you factor  
7 in addiction, it is clearly significant amount of  
8 their responsibility.

9 Dr. Benowitz said that there are chemical  
10 and physical changes. We already talked about his  
11 schematic there, that they're permanent. Although  
12 sometimes you see some changes after people stop  
13 smoking, some brain changes that go back. More  
14 severe in some people than others. Harder to quit  
15 than heroin.

16 Now, Dr. Larsen said no. Dr. Benowitz  
17 said yes. Dr. Resnik said yes. Dr. Resnik said  
18 yesterday -- day before yesterday, "I have  
19 counselors in my clinic, former drug users that used

20 heroin and other hard drugs, and have told me that  
21 it's harder to stop smoking than it is these other  
22 drugs."

23 Now, that's not to say that's a universal,  
24 but for some people, that's the case. Dr. Larsen  
25 said -- I don't think the question was put to him

Plaintiff's Closing Argument

15

1 fairly. The hypothetical that counsel asked, I  
2 believe, "Was are heroin and nicotine the same?"  
3 And he said, "Well, no." That's not the issue. Are  
4 they harder to quit, one than the other, for some  
5 people? Yes. That's no excuse, but to say it is a  
6 very addictive drug.

7 And that's what Dr. Benowitz told us. And  
8 then he told us about unprotonated and protonated,  
9 and I'll show you some pictures he drew about  
10 freebasing, about increasing the pH, increasing the  
11 base, those of you that know chemistry, alkaline and  
12 acid, making it more alkaline, increasing the base.

13 They really hate this subject. They don't  
14 want to talk about it. They really -- Philip  
15 Morris, "We don't do that. We put it in there to  
16 make the tobacco leaf more pliable, make it more  
17 sticky." Remember the films we saw going through  
18 the factory, and all of the big tanks of ammonia and  
19 urea? Remember, you burn urea and it turns into  
20 ammonia.

21 "But that's not for anything that affects  
22 the smoke." Well, if you look at these exhibits,  
23 256, 257, 261, 275, you are going to see studies of  
24 modulating or modifying the pH of the tobacco with  
25 bases called ammonia or urea.

Plaintiff's Closing Argument

16

1 Now, why are they doing that if it's not  
2 important? Why are they doing that if it's not  
3 important? Let's look at some of the documents. By  
4 the way, I have to point this out. Our case is  
5 based on hard evidence of documents and unbiased  
6 witnesses.

7 When I look at their case for the last six  
8 weeks, I see nothing but lawyer -- they didn't like  
9 it when I used this word, but I'm going to use it  
10 again -- lawyer-concocted green exhibits that they  
11 made in somebody's computer that they pop up here  
12 and say, "Does this summarize what you believe?"

13 How many times did they really talk about  
14 a document? How many times did they really talk  
15 about a document coming from Philip Morris, instead  
16 of some government document that talks about the FTC  
17 smoking method? Look at the evidence. Look at the  
18 witnesses. What is more reliable? Where is the  
19 truth?

20 Is it lawyer-concocted green exhibits that  
21 you pop up on the screen with a ray gun or is it  
22 their hard documents? Now, there's a bunch of  
23 series of these and I'm not going to show you them  
24 all because I've showed them to you before. But  
25 this one is 261. This is 1992. Some of them go

Plaintiff's Closing Argument

17

1 back in the '60s and '70s.

2 And this one says, "1991 accomplishments  
3 for Project 1620, Robin Kinser, Frank Gullotta,  
4 Item 3, we demonstrated" -- this is what they're

5 proud of. This is what they did in their  
6 laboratory. "We demonstrated the addition of bases  
7 to cigarettes, enhances subjective  
8 electrophysiological" -- oops, I didn't get the  
9 whole thing.

10 "We demonstrated the addition of bases,"  
11 that means increasing the pH, alkalinity, base.  
12 Okay. Ammonia is a base. Citric acid is an acid,  
13 like an orange. We got that basic from high school  
14 chemistry. "We demonstrated that the addition of  
15 bases to cigarettes enhances the subjective and  
16 electrophysiological responses."

17 Subjective, what is that about? It's how  
18 you respond, what you sense. And I said to  
19 Dr. Benowitz, "What is an electrophysiological  
20 response?" He said, "That's what's measured by an  
21 EEG, electroencephalogram." I said, "What's that  
22 mean?" He said, "They hook wires to your head and  
23 then they check it out and see when you smoke a  
24 cigarette that's got a higher basic to it, does it  
25 give a different response in your brain."

Plaintiff's Closing Argument

18

1 That's what they were studying. And these  
2 other documents, which aren't the only ones, by the  
3 way, will show that that's what they were up to.  
4 Well, why? Well, because it increases the impact.  
5 When it increases the impact, it increases the  
6 addictive experience.

7 Let's go back to a couple of these things  
8 that Dr. Benowitz drew for us. These are on those  
9 big charts. I think this one was actually drawn by  
10 Dr. Farone. But the unprotonated, meaning, it's  
11 what I understand to be a positive cation. It's got  
12 a charge. It passes through the cell wall easier.  
13 It is called freebasing. And it's done with ammonia  
14 and it's done with urea, which, when burned, turns  
15 to ammonia, and that increases the pH.

16 And when that happens, Dr. Benowitz taught  
17 us -- you know, I just said that backwards. I  
18 said -- well, let me clarify it. It's the  
19 unprotonated, freebased, not a positive cation, just  
20 the opposite. It's out here floating around. You  
21 increase the alkalinity -- no, I've got it backwards  
22 again.

23 When it is protonated, the positive cation  
24 passes through the cell wall. And the alkaline, the  
25 quality of it is higher. That is Exhibit 472.

Plaintiff's Closing Argument

19

1 That's one of those big charts over there.

2 The bottom line is you add a base to it,  
3 you freebase it and you make it pass through the  
4 cell wall quicker, and it creates an impact.  
5 Dr. Benowitz testified that there is some belief  
6 that it affects the nerves that go directly to the  
7 brain, and that's part of the addictive experience.  
8 That's what they spent their time on.

9 Now, the importance of this, if you recall  
10 Mr. Burnley, he said that he'd reviewed two  
11 documents that were the product of research by the  
12 competitors, and I read portions of the documents to  
13 them. Mr. Burnley, the engineer that still works  
14 there.

15 One of the documents indicates that the



16 smoke pH and the free nicotine in a Merit is higher  
17 than in a Marlboro 85. More impact. Another  
18 document, I read this motion to him. This is a  
19 Brown & Williamson document of 1984, and I read this  
20 to him and I asked him if he agreed with it. He  
21 said he was familiar with this document.

22 "Except for the ammonia usage, PM uses  
23 conventional processing. Differences from B & W  
24 processing are detailed. Ammonia treatment appeared  
25 to be the most important aspect of PM's blend

Plaintiff's Closing Argument

20

1 uniqueness. It is definitely used in making one of  
2 the two types of reconstituted tobacco and one of  
3 the two types of puff tobacco in these blends.

4 "There is more to PM's ammonia processing  
5 than simple addition of ammonia which leads to  
6 different results. They somehow force much of it  
7 throughout the tobacco constituents," et cetera.

8 The point of that is their competitors  
9 have reverse engineered their product and found  
10 exactly as was suspected, ammonia is added to this  
11 to increase the impact. The impact is part of the  
12 addictive experience.

13 Now, you are going to get an instruction  
14 that the judge is going to read you about the law  
15 that says, "I instruct you that good tobacco is not  
16 defective and dangerous to an the extent that  
17 contemplated by the ordinary consumer merely because  
18 smoking may be harmful," but the question is, is it  
19 just good tobacco? That's the issue. And, of  
20 course, it's not. It's not just good tobacco.

21 It has over -- not in one cigarette, but  
22 cigarette industry has over 600 additives, as you've  
23 seen, put into the tobacco. And as we saw through  
24 the video through the plant, urea, glycerin,  
25 propylene glycol, ammonia, it's not just good

Plaintiff's Closing Argument

21

1 tobacco. It's a combination of reconstituted leaf,  
2 blended leaf, chemicals flavorants, cocoa, licorice,  
3 all kinds of things, ammonia, and that's the  
4 importance of that fact.

5 And the importance of the fact that  
6 instead of working and trying to make this, as they  
7 said, not so bad, they found ways to make it more  
8 addictive, something we said we would prove to you  
9 at the outset of this case.

10 Let's go back over here on the addiction  
11 issue. So they knew they had a product that they  
12 could sell to people because they had to buy it if  
13 they could get them started early enough in life,  
14 and the addictive qualities of this product, and its  
15 comparison to other addictive products, I just want  
16 to remind you of what happened 48 hours ago in this  
17 courtroom.

18 Dr. Resnik, the OHSU prof, now part time,  
19 formerly full time, board certified. He went the  
20 extra mile to know more about his profession than  
21 those that aren't, to study more, to keep up, to  
22 take the test, to become more clued in about what's  
23 going on in his profession than Dr. Larsen.

24 He said Exhibit 2020, which we're going to  
25 look at, is a classic article. And he said this

Plaintiff's Closing Argument

22

1 issue of addiction is more complicated than simply  
2 just willpower. That's old thought. And it's more  
3 complicated than that because of issues of  
4 depression of which Michelle Schwarz was on  
5 occasion, and you heard why, because of her love for  
6 her husband and her concern for his medical  
7 condition, and off and on through her life.

8 You'll see those records. They'll be  
9 there for you. You can look at these medical  
10 records. Her level of addiction. She had been  
11 smoking a long time, starting at age 18. Fewer than  
12 10 percent of the people succeed. He said, "I think  
13 it's about two or three percent on each try."

14 Dr. Benowitz said it is fewer than 10  
15 percent. He said -- this is an issue we'll talk  
16 about later -- his patients think low tar is better.  
17 Dr. Larsen said, "I never heard that." We're going  
18 to talk more about Dr. Larsen as we move through the  
19 evidence.

20 Michelle Schwarz tried to quit many times.  
21 Depending upon how you listen to the evidence,  
22 you've got five to nine quit attempts, how you  
23 understand the evidence. She had overcome an  
24 alcohol problem, but then later on in life in 1976,  
25 looked at her options, her actual options were to

Plaintiff's Closing Argument

23

1 continue with an addiction that had cancer or to  
2 quit.

3 If they didn't market the Merit cigarette  
4 here which would have been cancer without addiction,  
5 test market for six months in Spokane, so that  
6 wasn't an option, this Merit Free. And you really  
7 have to question that, by the way. You really want  
8 to seriously sell a cigarette they know they can't  
9 without nicotine? We'll talk about that more in a  
10 little bit.

11 So she perceived that she could quit or  
12 she could maybe do something with low tar. And you  
13 heard Dr. Schwarz, who is in the courtroom there,  
14 and, by the way, may not be here tomorrow, depending  
15 on how it goes with his health. It has been a long  
16 day for him.

17 When she brought home those Merits, he  
18 said she was a bargainer. Well, these weren't so  
19 bad for her, he thought. Now, he's a medical  
20 doctor. He didn't study compensation. He is not a  
21 specialist in nicotine addiction, but he even  
22 thought those are better and she might wean herself  
23 off.

24 Now, his deposition was different, we  
25 admit that. He said he didn't really recall or

Plaintiff's Closing Argument

24

1 words to that effect. He is 63 at the time. He was  
2 sitting in a deposition for four or five hours with  
3 lawyers asking him all sorts of questions and just  
4 like Shirley Chuck, who is 76 in this courtroom, and  
5 gave a deposition when she was 75, people don't  
6 necessarily do exactly or recall everything as they  
7 once did when they are under the gun of two  
8 high-powered lawyers like these guys. You'll just  
9 have to evaluate that.

10 What makes sense? Michelle Schwarz  
11 switched to Merits just because it was happenstance

12 or did she think these were going to provide a  
13 benefit? Her father had smoked a light-tar  
14 cigarette and got sick and asked her to quit. That  
15 was about three years earlier, maybe two years,  
16 maybe about the same time.

17 She made that switch to Merits. Was it  
18 because she thought it was giving her half the tar  
19 and nicotine of the previous cigarette, but gave  
20 double that number? Probably so, that would be  
21 reasonable. And Richard Schwarz remembered what she  
22 was wearing that day. He said she has a pair of  
23 jeans on and a blue top.

24 She brought home this bag of groceries,  
25 and the Merit cigarettes in the carton, and said, "I

Plaintiff's Closing Argument

25

1 am going to try these. These aren't so bad for me."  
2 And he thought, great. She's always a bargainer.  
3 Maybe these will be lower in nicotine and she can  
4 wean herself off.

5 We'll see what Dr. Burns said about this  
6 when we look at this a little further. He's very  
7 concerned about the fact that people are misled.  
8 Instead of actually making a chance to quit, as  
9 Dr. Resnik said, "They think low tar is better.  
10 They think they can get more time. They don't take  
11 the option to quit because they think it's not so  
12 bad."

13 And that's exactly, as we look at this  
14 exhibit, Exhibit 75, what they wanted them to do.  
15 "Market potential of a health cigarette, 1966." Our  
16 good friend, Myron Johnston. What's he say? A  
17 couple very important things.

18 "Two years after the Surgeon General's  
19 report, a new market is being created. People are  
20 now concerned about their health and what smoking is  
21 doing to it." And so they decide to meet that  
22 market, as they say in the business.

23 "A large proportion of smokers are  
24 concerned about the relationship of cigarette  
25 smoking to health." And then there is a table and a

Plaintiff's Closing Argument

26

1 study and all of that.

2 "Mere reduction in nicotine in total  
3 particulate matter," that's tar, TPN, "deliveries by  
4 conventional methods of filtration would not be a  
5 sufficient basis for launching a new cigarette, and  
6 to attempt it would be to court disaster.

7 "10: The illusion of filtration is as  
8 important as the fact of filtration." They know  
9 they don't have to really deliver a difference as  
10 long as people think they are delivering a  
11 difference.

12 "Therefore, any entry should be a  
13 radically different method of filtration that need  
14 not be any more effective." Now we start seeing  
15 holes and porous paper and recessed filters and all  
16 sorts of gimmicks. We'll understand, as we get  
17 through this further, what those gimmicks really  
18 were intended to do.

19 You know, if they really wanted to deliver  
20 a low-tar cigarette, and we're going to get to  
21 Exhibit 2020 where this has some very important  
22 bearing, but if they really wanted to deliver a

23 low-tar cigarette, a low-nicotine cigarette, why  
24 does all the tobacco in a cigarette have the same  
25 amount of nicotine?

Plaintiff's Closing Argument

27

1 And, remember, the nicotine and tar is  
2 always in a very tight ratio: Ten to one, nine to  
3 one. It's always the same. That is what  
4 Dr. Benowitz told us, I think, two to three times.  
5 Why is it always the same nicotine amount, about  
6 one-and-a-half percent in all the tobacco used and  
7 all the cigarettes? Dr. Carchman admitted that.

8 Now, if you really want to do a low-tar  
9 cigarette, a low-nicotine cigarette, why don't you  
10 blend it so it's lower? And the answer to that is  
11 you can't then engineer the other thing, the holes  
12 and the porous paper and the burn rate and all of  
13 that stuff, so people can suck on it harder and get  
14 that minimum dosage of nicotine.

15 That's the answer. You want to be able to  
16 manipulate and engineer the cigarette and keep the  
17 nicotine level and tar level pretty constant in the  
18 tobacco. And that's what they were up to. Whether  
19 or not this Next idea or Merit Free would work, they  
20 knew the answer before they even tried.

21 They said here, "A cigarette that does not  
22 deliver nicotine cannot satisfy the habituated  
23 smoker and cannot lead to habituation. And would,  
24 therefore, almost certainly fail. Health claims  
25 alone without flavor and nicotine cannot sell

Plaintiff's Closing Argument

28

1 cigarettes. Most smokers would rather quit than  
2 switch."

3 You know, this industry with all of its  
4 money has got to be one of the most sophisticated  
5 marketing industries ever. They knew exactly what  
6 they were doing, and they knew exactly how to meet  
7 the market. Philip Morris only recently admitted on  
8 the Internet, some 20, 28 months ago, that smoking  
9 is a risk factor for disease and smoking is  
10 addictive.

11 Why did it take them so long? You decide.  
12 Is it because of the documents that are recently  
13 compelled to come forward, so families like the  
14 Schwarz family can get ahold of them and put them  
15 before people like yourself? Is that the reason?  
16 That is the reason. That's the freight train. They  
17 saw the light. They saw the light on the freight  
18 train coming at them.

19 And they settled the case with the  
20 government for the Medicaid expenditure, but they  
21 have yet to ever acknowledge any responsibility to  
22 any individual. This admission occurred after  
23 Michelle Schwarz died. It made no difference to her  
24 or her family.

25 This truth telling on their part, you

Plaintiff's Closing Argument

29

1 heard it said, one of the witnesses, Dr. Carchman,  
2 "We want to reconnect with the scientific  
3 community." You heard another witness say, "We were  
4 slow to realize." I was waiting for, "We're out of  
5 step with the rest of the world."

6 They were the only industry that refused  
7 to admit addiction and refused to admit smoking

8 caused cancer. And, again, why? It's because of  
9 the psychological crutch. They need to give people  
10 an excuse.

11 President Campbell in the Waxman hearings  
12 when Ron Wyden asked him questions, and Congressman  
13 Waxman asked him questions, he was under oath. He  
14 said, "It wasn't addictive and smoking doesn't cause  
15 lung cancer." And now we hear from Dr. Carchman  
16 that the change in that position, the change was a  
17 business decision. A business decision in part  
18 influenced by business person, lawyer, Steve  
19 Parrish, who is one of the big wheels at Philip  
20 Morris.

21 It didn't have anything to do with the  
22 truth. I know and I watched you when I asked the  
23 question, "What happened between this hearing of  
24 April 14th, '94, and their admission on the Internet  
25 in the way of a scientific development, what

Plaintiff's Closing Argument

30

1 happened, anything?

2 "No," said Dr. Carchman, "it was a  
3 business decision." Now, the point of all of that  
4 is under oath they said just the opposite. Can you  
5 trust anything they said? Can you trust anything  
6 they say at any time?

7 I'm going to read to you what Dr. Carchman  
8 said in his testimony about this subject.

9 "On April 14th of 1994, you saw him under  
10 oath testify before the Waxman hearing," speaking  
11 about President Campbell, "that smoking did not  
12 cause lung cancer and that smoking was not  
13 addictive. Do you recall that?

14 "Answer: No, I only saw it on television  
15 after that, and my recollection was that he used  
16 slightly different words. I think he said something  
17 to the effect that he said it had not been  
18 scientifically proven.

19 "Question: And the jury has seen it  
20 twice, so we can quibble about what he said. I  
21 don't mean to misstate what he said but that was in  
22 April 14th of '94, and sometime in late '99 or early  
23 2000, your Web site went and acknowledged for the  
24 first time that smoking causes lung cancer and  
25 smoking is addictive, correct?

Plaintiff's Closing Argument

31

1 "Answer: Yes, sir.

2 "Question: What scientific discovery  
3 occurred between those two dates, '94 and 2000, that  
4 allowed you to make that change?

5 "Answer: There were no new scientific  
6 discoveries in that period.

7 "Question: The decision to make that  
8 change was, in fact, not a scientific decision, but  
9 was, in fact, a business decision, was it not, sir?

10 "Answer: Yes, sir.

11 "Question: It was a business decision by  
12 a fellow who is also a lawyer, correct?

13 "Answer: You have to be more specific.

14 "Question: Well, a fellow by the name of  
15 Parrish, I believe was involved in that, was he not.

16 "Answer: Mr. Steve Parrish, yes."

17 That's Dr. Carchman.

18 In 1969, Congress passed a law requiring a

19 warning on the package. That protects the  
20 manufacturers from any claim after 1969 that the  
21 warning inadequate. You are going to get an  
22 instruction on that from the Court. That is not the  
23 basis of claim, that the warning is inadequate.

24 In 1964 -- that's after 1969, by the way.  
25 The first warnings appeared in 1966.

Plaintiff's Closing Argument

32

1 In 1964, Michelle Schwarz started smoking.  
2 There were no warnings that the defendants gave to  
3 Michelle Schwarz. What they did give her, as we've  
4 seen from Mr. Weissman, is a psychological crutch,  
5 Exhibit 57.

6 In 1969, the warning said, "may be  
7 hazardous." They changed to, "Surgeon General finds  
8 smoking dangerous," in 1970. By that time, you  
9 heard the testimony of Dr. Benowitz and I think  
10 another doctor, probably in a year or three years,  
11 someone is addicted, and by that time, it's too  
12 late.

13 And you heard from Mr. Garrets, the  
14 teacher who was teaching kids not to smoke, that he  
15 said, "I never knew what the warnings said anyway.  
16 People that are addicted tend to put those out of  
17 their mind. They don't want that information."

18 And in 1985 to the present, I am sure that  
19 the defendants will show you, there's a rotated  
20 group of warnings. Some say, "Don't smoke if you're  
21 pregnant." Some say they cause cancer, some say  
22 they have too much carbon monoxide. The point of  
23 this is, the warnings after 1969 are not the basis  
24 of this claim.

25 We're going to tell you what the basis of  
Plaintiff's Closing Argument

33

1 the claim is as we move through this evidence. But  
2 now we're going to talk about the Merit fraud which  
3 is the center part of the Schwarz family claim, and  
4 we're going to talk to you about low-tar cigarettes  
5 and all of that.

6 We know that she started with Benson &  
7 Hedges and switched to Merit in 1976. We know that  
8 people wanted a healthy cigarette. That is the  
9 exhibit I just showed you, Exhibit 75. And we know  
10 that the FTC test was not what it seemed. That's  
11 Exhibit 220.

12 Philip Morris knew that people didn't  
13 smoke like the smoking machine. What's the smoking  
14 machine? Remember Dr. Benowitz's big chart? This  
15 is what it does, it draws 35 milliliters of air over  
16 two seconds taken every 60 seconds, and then as you  
17 recall his explanation, the Cambridge filter method  
18 also known as the Ogg method.

19 They then take the gunk that accumulates  
20 in this, put it in a solution, collect it and  
21 measure it. They get the nicotine out of it and the  
22 tar out of it, and that's how they rate the  
23 cigarettes.

24 Now, there's going to be an effort to  
25 confuse you on this case, and say, "Well, if we did

Plaintiff's Closing Argument

34

1 that, the Judge says in instruction that we can't be  
2 held responsible."

3 This instruction says, "Industry and

4 government code standards may be considered by you  
5 as evidence as to whether or not defendant acted  
6 with reasonable care." Well, that has nothing to do  
7 with anything. You know, we know they did this  
8 test. They have to do this test, but that doesn't  
9 protect them from liability. That has nothing to do  
10 with whether or not they are at fault.

11 The issue is if they know that low-tar  
12 cigarettes do not deliver low tar to people but only  
13 to machines, do they have the right to represent  
14 them to the public as low tar? That's the issue.  
15 They don't have to call them low tar. They are not  
16 required to do that. That's their choice. That is  
17 Philip Morris' choice to call them low tar.

18 And if they know that the only thing that  
19 gets low tar out of them is a machine, they've got  
20 to be more careful. They don't have to represent it  
21 that way. But why do they like that test? Well,  
22 the answer is found, again, in the hard evidence in  
23 this case, not the testimony by \$400,000 a year  
24 experts. And not the arguments of lawyers, but in  
25 actual evidence.

Plaintiff's Closing Argument

35

1 Exhibit 465, 1974, Dr. Wakeham, in a  
2 speech. This is an outline of a speech.  
3 "Confidential." The freight train made this  
4 possible for you to see. The Master Settlement  
5 Agreement, making them make all these documents  
6 public that have been previously sealed in other  
7 litigation now for you to look at.

8 "People smoke to get nicotine; more  
9 nicotine will compensate for less tar. Smokers are  
10 taking in more than the FTC ratings." They know  
11 that. "Generally people smoke in such a way that  
12 they get much more than predicted by machine. This  
13 is especially true for dilution cigarettes."

14 Dilution cigarettes are cigarettes with a  
15 hole around the filter so that the smoke is diluted  
16 by air as you breathe in. But if you puff harder,  
17 Dr. Benowitz says, you can easily defeat that  
18 feature, because the holes are so small, the air is  
19 going to come from the end of the cigarette and give  
20 you more smoke than the air is going to come in from  
21 the side. And that's called compensation. You  
22 defeat that feature.

23 I hope I am not telling you what you've  
24 heard a thousand times. You say, "Lawyer, get off  
25 that. I heard it. I've heard it so much, come on."

Plaintiff's Closing Argument

36

1 So I am going to move through it. The point of this  
2 exhibit is they liked it. "The FTC standards test  
3 should be retained because it gives low numbers."

4 It allows them to make the representation  
5 they want to. This is better for you, gives low  
6 numbers. That's why they want it. Dr. Carchman was  
7 quick to point out when Mr. Phillips asked him the  
8 benefits of the FTC test in Exhibit 1004, the 1981  
9 Surgeon General report that Dr. Burns said, "I  
10 wished I had known the full story, the one that  
11 recommends low-tar cigarettes if you don't  
12 compensate.

13 And he said, "People compensated much more  
14 rapidly and involuntarily than we ever imagined,"

15 and this report on Page 54, Mr. Phillips brought up  
16 this evidence and I'm glad to remind him of it.  
17 "The effects of smoking machine parameters on  
18 relative and absolute yields of smoke components  
19 from various types of cigarettes."  
20 That is not the point. The point is the  
21 sentence after the next. "The FTC ratings of tar  
22 and nicotine yields measure an implied risk to the  
23 smoker." An implied risk. Lower tar, less risk.  
24 You don't have to be a smoke scientist to know that.  
25 It is a dose response relationship.

Plaintiff's Closing Argument

37

1 If you think you are getting less, you  
2 think your exposure to disease is less, yet they  
3 know that nobody, when they switch from a  
4 Benson & Hedges to a Merit spontaneously, very few  
5 people are getting less. And if they're getting  
6 less, it may be 10 percent at best.  
7 How long did they know about compensation?  
8 Is that something that just occurred to their  
9 awareness? You are going to hear a lot of evidence.  
10 "We thought we were doing the right thing for 35  
11 years." Mr. Phillips is going say that over and  
12 over again, "It was all a surprise to us. Dr. Burns  
13 and his research and Dr. Benowitz."

14 Well, that first of all begs a question.  
15 If you're a manufacturer of a product, you are held  
16 to know everything about it. You can't blame  
17 everybody else. "Well, it's not my responsibility.  
18 It's Joe down the street. He should know more about  
19 my product than I do?" That's crazy. And just  
20 because it's legal is no excuse either.

21 Firestone tires are legal, but if the  
22 manufacture is faulty, if there is a  
23 misrepresentation, if they don't meet reasonable  
24 consumer expectations, Firestone Bridgestone is  
25 liable. Same with the Ford Escort. Same with any

Plaintiff's Closing Argument

38

1 product.  
2 Just because it is legal doesn't mean that  
3 you can be negligent or not be held in strict  
4 products liability, we'll talk about that,  
5 responsible for it if it doesn't meet reasonable  
6 consumer expectations. Tires aren't supposed to fly  
7 off of cars and disintegrate.

8 Ford Escorts are not supposed to roll, and  
9 cigarettes that are supposed to be low tar are  
10 supposed to be low tar, not the same as everything  
11 else, in fact, in a way that you have to inhale so  
12 deep and harder, that you may even be worse for it  
13 because they know you are going to want to get a  
14 daily dose of nicotine, that same amount.

15 How long have they known that. Well,  
16 Dr. Wakeham in Exhibit 36, knew it back in '61.  
17 Schori and Dunn for Philip Morris knew it in '71,  
18 and Barbro Goodman knew it in '75. Exhibits 36, 125  
19 and 53. Let's talk about evidence. Let's just not  
20 talk about ideas and argument. Let's look at hard  
21 evidence.

22 Exhibit 36, Dr. Wakeham, 1961, March 24.  
23 "As we know, all too often, the smoker who switches  
24 to high fi" -- high filtration -- "cigarettes winds  
25 up smoking more units in order to provide himself



1 with the same delivery which he had before." That  
2 is the concept of compensation.

3 November '71, T.R. Schori, William Dunn,  
4 Exhibit 125. As tar delivery decreased from that to  
5 which the smokers were accustomed, cigarette  
6 consumption increased. This resulted in a tendency  
7 for the smoker's daily intake of tar to remain  
8 constant even though the tar deliveries of the  
9 cigarettes he smoked differed markedly. When  
10 nicotine increased from that to which the smoker  
11 were accustomed, cigarette consumption decreased."

12 So, remember that the concept is if you  
13 smoke a higher tar and nicotine cigarette, say, a  
14 24, you're normally smoking a 16 Benson & Hedges,  
15 and you go up to a straight, you are going to back  
16 off, you don't need that much nicotine. But if you  
17 go down to an 8 milligram and a half a milligram of  
18 nicotine, you are going to smoke it harder. You are  
19 going to move towards the one, the daily intake that  
20 you are accustomed to.

21 THE COURT: I think we'll take a minute  
22 stretch break. I want to keep you alert. I want to  
23 try to stay alert myself.

24 MR. WOBBROCK: Thank you, Your Honor. I  
25 hope that's not a reflection of what I'm doing.

1 THE COURT: Oh, no. So much information  
2 coming in, the brain has to try to assimilate all of  
3 that and sometimes it needs a rest period.

4 (Pause in proceedings.)

5 THE COURT: All right. The jury is ready  
6 to go again. Let's get started again, counsel.

7 MR. WOBBROCK: Thank you, Your Honor.

8 So here's what we were talking about,  
9 16 milligrams of tar, 1 milligram nicotine in  
10 Benson & Hedges. Eight milligrams tar and a half a  
11 milligram in Merits. Exhibit 2021. This is one of  
12 those big charts again.

13 Well, there is going to be an effort to  
14 confuse you and that's this Exhibit 915. And this  
15 exhibit says a lot of things about a lot of  
16 subjects, but what it doesn't say is that  
17 compensation isn't real or that it doesn't actually  
18 occur or that it isn't permanent.

19 What it talks about is number of  
20 cigarettes, not internal compensation. And remember  
21 internal compensation is drawing harder, holding it  
22 deeper, puffing more frequently, working that  
23 cigarette harder. External compensation is smoking  
24 more cigarettes. This measures in a very crude way  
25 external compensation, whether people smoke more

1 cigarettes. This is called the Ryan study. This is  
2 what the defense wants you to look at.

3 And Dr. Benowitz talked about this. There  
4 are three studies here and they basically talk  
5 about, "We don't see evidence when people switch, in  
6 this experimental study when we make them switch  
7 cigarettes, we don't see evidence of compensation as  
8 much as we thought we would, except one of out of  
9 the three studies we do, we see it one of the three  
10 studies, but it is a very crude measure, and it's

11 even got a cruder name: Butt analysis.  
12 They take those cigarettes and they cut  
13 open the cigarette butts and the filters and they  
14 measure the amount of nicotine and tar and they  
15 compare that with the rating of the cigarette. And  
16 they say the cigarette is rated X, there is Y  
17 remaining in the filter; and, therefore, the smoker  
18 must have gotten Z.

19 Dr. Benowitz said, "That is a crude  
20 method. We don't do that anymore. We do cotinine  
21 analysis. We do cotinine analysis, the metabolite,  
22 one of several in the blood that changes from  
23 nicotine that's fairly constant, and can be  
24 predicted how -- the half life, how much dissipates  
25 and goes away, the half life and how it changes or

Plaintiff's Closing Argument

42

1 just disappears. That's what we measure. We don't  
2 do this nicotine remaining in the filter."

3 And that's this Ryan study. And they are  
4 going to have you believe that compensation is just  
5 a theory and there are studies, different studies.  
6 Where are their independent experts, like  
7 Dr. Benowitz and Dr. Burns, that came forward and  
8 said that? The only guy that said that is  
9 Dr. Carchman at \$405,000 a year, who still works for  
10 them. He's the guy that said that.

11 Who, by the way, had so much deniability  
12 because he doesn't start there until 1989, after  
13 much of that bad things that he didn't like were  
14 behind in the way of ditching documents and things  
15 like that. He had deniability, remember that?  
16 Deniability.

17 But anyway on this subject, I invite you  
18 to look at this document, Exhibit 915, and compare  
19 that with Exhibit 2020. Now, they are going to say,  
20 "You know, this is 1976, and science just went  
21 better if we had known." Wait a minute, they have  
22 been calling light cigarettes low-tar cigarettes  
23 after Benowitz's 1983 study, which he said was one  
24 of many, by the way, that confirms this total  
25 compensation.

Plaintiff's Closing Argument

43

1 And, again, they're the manufacturer of  
2 the product. They can't put it off on other people  
3 and say, "We didn't know." They are supposed to  
4 know. And don't get confused about this subject.  
5 Dr. Benowitz, this is, again, Exhibit 475. This is  
6 one of the those big pieces of paper that we wrote  
7 on.

8 "In enforced brand switching compensation  
9 is about 80 percent." What does that mean, forced  
10 brand switching? You go in that room and you smoke  
11 these and you smoke. Then a week later, you smoke  
12 these and you smoke these. We'll switch. I don't  
13 care if you don't like them or not. You're going to  
14 smoke this one, and you are going to smoke this one,  
15 and then you're going to switch.

16 On cross sectional self-selected, also  
17 called spontaneous brand switching, compensation  
18 intake is complete. Compensation is complete.  
19 That's what Dr. Benowitz says. Look at his article,  
20 Exhibit 2020. Don't get confused about forced brand  
21 switching in artificial situations.

22 Now, I said that this Ryan exhibit spoke  
23 volumes. We're going to take a slight detour. We  
24 are going to talk about something that is not  
25 100 percent related to compensation for just a  
Plaintiff's Closing Argument 44

1 minute. These are my marks. This last mark is,  
2 "Why did compensation go up in this study?" That's  
3 the one out of three.  
4 But what I wanted to show you about this  
5 goes back to the freight train. There was a period  
6 of time you can easily conclude from looking at this  
7 document in which for whatever reasons, and we know  
8 the reason, you don't have to put your own  
9 experience and knowledge aside when you walk into  
10 the courtroom.  
11 When you talk to a lawyer and give lawyers  
12 documents, those are secret and privileged. They  
13 took these kinds of documents and sent them to their  
14 lawyers, and all of the data, setting up a shield so  
15 they wouldn't be produced in litigation. And then  
16 they come back after the Master Settlement Agreement  
17 and they finally have to make them available.  
18 "Well, come on, lawyer, you're reading too  
19 much into that."  
20 Well, "Incidentally, there are several  
21 minor typographical errors in this report which  
22 would make it criticizable in a courtroom." Why is  
23 that in a legitimate -- supposed legitimate  
24 scientific study?  
25 I asked Dr. Carchman, "What do people know  
Plaintiff's Closing Argument 45

1 about this low-tar cigarette? Do they really think  
2 it's low tar or do they know about the difference  
3 between the machine and what people really get?" My  
4 question to him was, "Let's talk about this. The  
5 consumer doesn't know that, though, does he? They  
6 don't know they are going to get a different number  
7 than the machine. You'd agree with that, wouldn't  
8 you, sir?  
9 "Answer: We talked about that before. I  
10 would agree with you."  
11 And I asked him, "Now, your company or any  
12 company is not required to use the term low tar, are  
13 they?  
14 "Answer: I don't know.  
15 "Question: You don't know that?  
16 "Answer: I don't know that. I know there  
17 is a relationship between what the FTC allows with  
18 regard to descriptors, but they have defined in some  
19 way those descriptors, but to say they are allowed,  
20 I would think you should be asking the lawyer and  
21 not a scientist."  
22 In this corporation with these experts,  
23 who knows? Somebody has got to know.  
24 Talking about compensation again.  
25 "Dr. Carchman, you agree or you don't disagree with  
Plaintiff's Closing Argument 46

1 Dr. Benowitz, do you, that most smokers don't know  
2 did about this?  
3 "Answer: Don't know?  
4 "Question: About compensation.  
5 "Answer: Well, they may not know the  
6 term, but do most smokers know when they smoke

7 different kinds of cigarettes, they smoke them  
8 differently? I have no scientific knowledge  
9 personally to answer that question, but I believe  
10 that most smokers when they smoke different kinds of  
11 cigarettes recognize most of the time that they are  
12 smoking them differently and they are smoking more  
13 of them or less of them.

14 "Question: So without any data, you are  
15 willing to venture an opinion?

16 "Answer: No, I didn't say that. What I  
17 said was in the absence of me personally having  
18 data, it wouldn't surprise me. Well, again, to be  
19 very specific, I guess, surprise -- wouldn't  
20 surprise me, it's not giving me -- is not giving you  
21 a scientific opinion. I have no scientific data  
22 that would allow me to make a scientific opinion on  
23 this.

24 "Question: Well, let me read you what you  
25 said under oath in a prior situation."

Plaintiff's Closing Argument

47

1 This is under oath in a prior situation.

2 "Dr. Benowitz's testimony on April 6th, I  
3 am going to read it to you and ask you a few  
4 questions. Limitations on FTC method haven't been a  
5 secret for over 30 years, if ever."

6 His answer, Dr. Benowitz, "Not a secret to  
7 the FTC. I think most smokers have not been made  
8 aware of that. Most smokers think that low-yield  
9 cigarettes are less hazardous. Most smokers don't  
10 realize that you can smoke" --

11 Dr. Carchman: "Excuse me, this is  
12 Dr. Benowitz?"

13 "Question: Yes, and then there is a  
14 question to you.

15 "Okay. Most smokers don't realize that  
16 you can smoke the lowest yield cigarette to the  
17 highest yield cigarette with a 10 percent difference  
18 in exposure rating. This is Dr. Benowitz. So very  
19 little exposure difference, which is what you see if  
20 you are a heavy smoker.

21 "Smokers have never been told what to do  
22 to avoid compensation. So where scientists know  
23 about that and the government knows about that,  
24 smokers do not know about compensation, in general.  
25 I think they should have because they are the ones

Plaintiff's Closing Argument

48

1 whose behavior needs to be adjusted if they really  
2 want cigarettes to be less hazardous.

3 "Do you agree with that?"

4 That's a question to Dr. Carchman.

5 "Answer: Well, in general, I don't  
6 disagree with it in terms of what the consumer knows  
7 or doesn't know about low-tar cigarettes and FTC. I  
8 am not competent to address that."

9 That was the testimony in this courtroom.  
10 Just to review one more time, how this works.  
11 Remember the chart I put up in the corner there to  
12 Dr. Carchman. And I talked about an issue of  
13 agreement. And I hope this will not bore you as I  
14 remind you of this testimony.

15 "All right. So the concept of  
16 compensation, I just want to see if we have  
17 agreement here so we're talking about the same

18 thing, would be that if someone were to regularly  
19 smoke a Benson & Hedges, and they then went to a  
20 higher-yield cigarette because they were used to the  
21 amount that came from the Benson & Hedges, they  
22 probably wouldn't smoke the higher-yield cigarette  
23 as hard.

24 "They wouldn't puff on it as hard. They  
25 wouldn't inhale it as much or use the cigarette,

Plaintiff's Closing Argument

49

1 puff on it so frequently. They would try and get  
2 about the same amount of nicotine and tar they got  
3 from the Benson & Hedges from the higher-yield  
4 cigarette. That's the concept of compensation,  
5 correct?

6 "It's consistent with it, yes," is the  
7 answer.

8 "Question: So when you go up from a  
9 lesser-yield cigarette, you kind of back off, fair  
10 to say?

11 "Answer: Yes, that can happen.

12 "Question: And then the concept, just the  
13 concept now of compensation, because when you go  
14 down, you do just the opposite, you smoke it a  
15 little harder. So if you went from Benson & Hedges  
16 to a Merit, the concept of compensation is that you  
17 draw on this harder, you inhale it deeper and you  
18 smoke it more frequently.

19 "I should say you puff on it more  
20 frequently, so you equal out basically what you've  
21 gotten from the cigarette that you are used to. If  
22 that is your regular brand, that's the concept of  
23 compensation.

24 "Answer: That is a component of that  
25 concept.

Plaintiff's Closing Argument

50

1 "Question: So in other words, if you are  
2 the middle range smoker when you smoke either of  
3 these cigarettes, you either back off on the higher  
4 one or you work a little harder on the lower one to  
5 try and get you to where you are used to.

6 "Answer: That's the concept."

7 Now, remember in this courtroom that  
8 Dr. Benowitz -- excuse me, Dr. Carchman said that  
9 there was some evidence it was temporary. And  
10 Dr. Whidby said, "I didn't think it was a problem.  
11 I don't think compensation is a problem." Do you  
12 remember that.

13 And they both didn't know about Exhibit  
14 2035, which is so new that they hadn't heard about  
15 it, but it's not a problem, they said. 2035 which  
16 they were surprised to see is instructions on how to  
17 smoke lower-tar cigarettes. Remember the cut-off  
18 line for low-tar is 15? Above that it's considered  
19 more regular. The Merits are 8, Benson & Hedges was  
20 16.

21 The amount of tar and nicotine you inhale  
22 will vary depending upon how you smoke the  
23 cigarette. Not a problem, but now they've got to  
24 put this out. And it was so new, Dr. Whidby said  
25 he'd never seen it before. Dr. Carchman said he saw

Plaintiff's Closing Argument

51

1 it the day before. The lawyers gave it to him.

2 Remember that? The lawyers gave him that

3 receipt. This is Exhibit 2020. You are going to  
4 have it in the courtroom -- excuse me, in the jury  
5 room.

6 Dr. Benowitz and five other doctors,  
7 "Smokers of low-yield cigarettes do not consume less  
8 nicotine." You will have a chance to read it. I  
9 read it to you several times. I've read it to their  
10 witnesses.

11 "Cigarette tobacco contained an average of  
12 1.57 percent of nicotine. Tobacco from low-yield  
13 cigarettes does not contain less nicotine than  
14 tobacco from higher-yield cigarettes. This is  
15 probably well known to the tobacco industry, but to  
16 our knowledge, has not been discussed in the medical  
17 literature. The main determinant of whether a  
18 cigarette has a low or high yield in machine testing  
19 are the characteristics of its ventilation and  
20 burning.

21 If you make it burn faster, it gets  
22 through the cigarette smoking machine quicker and  
23 they don't collect as much tar and nicotine out of  
24 it. You fool the machine, so it gives low numbers.  
25 Remember Exhibit 436? Gives low numbers.

Plaintiff's Closing Argument

52

1 "Both of these variables are under the  
2 control of the cigarette smoker and allow  
3 considerable variation in nicotine input. We also  
4 found that people who wanted to stop smoking and  
5 were smoking low-yield cigarettes did not consume  
6 less nicotine as judged by the blood cotinine  
7 concentration than smokers of higher-yield  
8 cigarettes.

9 "We think that in the case of a habitual  
10 smoker for whom cutting down on nicotine and tar  
11 intake is considered to be medically important, it  
12 is unlikely that changing the brand of cigarette  
13 will accomplish this goal. In summary, we found  
14 that the tobacco in low-yield cigarettes does not  
15 contain less nicotine than higher-yield cigarettes  
16 and that smokers of these cigarettes do not consume  
17 less nicotine.

18 "The FTC cigarette testing data do not  
19 predict nicotine intake by the cigarette smoker.  
20 Advertisements from cigarette manufacturers  
21 suggesting that smokers of low-yield cigarettes will  
22 be exposed to less tar and nicotine is misleading.  
23 Patients who smoke cigarettes should be so advised."  
24 Exhibit 2020 will be in your hands.

25 Well, I asked their marketing person,

Plaintiff's Closing Argument

53

1 Ms. Lund, to have you use the term low tar. "No one  
2 requires -- no law requires that if the cigarette  
3 does not deliver low tar that you have to use the  
4 term low tar?

5 "Answer: We are not required to use the  
6 term low tar.

7 "Question: That is your choice?

8 "Answer: It is our choice."

9 As Dr. Burns said, "Machines don't get  
10 addicted, machines don't get cancer. Don't look at  
11 that at any sort of reasonable alternative because  
12 it's a fraud." It's a fake and it's misleading  
13 advertising. It's not what a company that says in

14 The Frank Statement that, "People's health is  
15 paramount to all other concerns" does.  
16 Low tar does not provide less risk in that  
17 it doesn't deliver low tar to people. PM marketed  
18 low tar to people like Michelle Schwarz who were  
19 thinking about quitting.  
20 Dr. Burns, this is as best that we can  
21 recall it. "People bought an illusion of risk  
22 reduction. They minimized their real chance to  
23 eliminate risk by quitting when they switched to low  
24 tar. Had they not bought into the illusion of low  
25 tar, more people would be alive today."

Plaintiff's Closing Argument

54

1 1981 Surgeon General's report, "Switch to  
2 low tar if you can't quit." And you'll see from  
3 that report, it says, "Don't compensate." Didn't  
4 know that people did it so quickly, so rapidly, so  
5 completely.

6 "Had we known what Philip Morris in 1981,  
7 we would have never recommended switching to a  
8 low-tar cigarette." Dr. Burns.

9 I hope you can all see that.

10 The representation that low-tar cigarettes  
11 or low tar to people, if it's not a complete  
12 falsehood is certainly a half-truth, and the  
13 half-truth is a basis of liability in this case, the  
14 basis of fraud.

15 When you have the obligation to tell the  
16 whole truth, you cannot tell a half-truth. It's a  
17 half-truth in the sense it gives low tar to a  
18 machine. It doesn't give low tar to people, people  
19 who buy its product. There was not full disclosure  
20 of the research. They knew that, and it was a clear  
21 misrepresentation.

22 Defendant's suppressed research. You'll  
23 see reference, and this wasn't talked about too  
24 much, but there was a gentlemen's agreement, Exhibit  
25 92 talks about that on Page 4, in which the

Plaintiff's Closing Argument

55

1 companies agreed not to research the biological  
2 activity of the products.

3 They didn't want each other making claims  
4 or competing or generating paper that could end up  
5 in a courtroom about the dangerousness of their  
6 product. That is really not the focus of this case,  
7 but it is Exhibit 92. But the company policy was  
8 talked about and we'll get to that in a minute, but  
9 let me talk to you about a couple of instructions  
10 you're going to get.

11 Unreasonably dangerous, consumer  
12 expectation test. "A product is unreasonably  
13 dangerous when it is dangerous to an extent beyond  
14 that which would be contemplated by the ordinary  
15 consumer who purchases the product with the ordinary  
16 knowledge coming to the community as to its  
17 characteristics."

18 Whoa, sorry, there we go.

19 "Unreasonably dangerous if it doesn't meet  
20 what would be contemplated by the ordinary  
21 consumer." How many people know that low-tar  
22 cigarettes are not low tar? How many people know  
23 that? The people at the FTC, people at Philip  
24 Morris. Do the public that buys these cigarettes

25 know that?

Plaintiff's Closing Argument

56

1 Has that been modified, Mr. Tauman?

2 MR. TAUMAN: I'm just checking.

3 MR. WOBBROCK: Make sure that we follow

4 the law here.

5 Liability for defective product. The

6 Judge is going to tell you, "I now will instruct you

7 on the law of strict liability for a defective

8 product. A defendant is liable for harm caused by

9 the product if the defendant was engaged in the

10 business of manufacturing or selling the product."

11 That's not an issue.

12 "The product was in a defective condition

13 that it was unreasonably dangerous to the plaintiff

14 when the product left the defendant's hands, and the

15 product was intended to and did reach the plaintiff

16 without substantial change in the condition in which

17 it was manufactured or sold."

18 Unreasonably dangerous, we just defined

19 that. "The product was unreasonably dangerous, and

20 it is dangerous to an extent beyond that which would

21 be contemplated by the ordinary consumer." You'll

22 have that. That's the law in the case the Judge is

23 going to give you. I give you this instruction with

24 the Court's permission.

25 But in addition to products liability on

Plaintiff's Closing Argument

57

1 low tar, there is also fraudulent misrepresentation

2 which I'll tell you about in a minute. The

3 plaintiff has alleged," we're the plaintiff, you

4 know that clearly, "has alleged that Michelle

5 Schwarz and her estate were damaged as a result of

6 the defendant's fraud.

7 "To prevail, the plaintiff must prove each

8 of the following elements: The defendant has made a

9 false representation of a material matter." Well,

10 if you buy low-tar cigarettes, they better be low

11 tar. That's material, and they didn't do that.

12 "The defendant knew the representation was

13 false or recklessly made, the representation,

14 without knowing it was true or false." They knew.

15 They knew people compensated.

16 "The defendant intended to mislead

17 Michelle Schwarz." They intended to mislead

18 everybody. She was one of the purchasers.

19 "Michelle Schwarz reasonably relied on the

20 defendant's representation, and Michelle Schwarz

21 suffered injury and death as a direct result of her

22 reliance on the defendant's misrepresentation." She

23 saw this as a reasonable alternative to quitting.

24 Her husband was fooled himself. He thought this low

25 nicotine amount would help her wean herself off and

Plaintiff's Closing Argument

58

1 get off these things.

2 Remember, Dr. Resnik said people in

3 mid-life, 50 years old and around to 60, they tend

4 to quit more. She wasn't given that chance. She

5 got cancer and died before she had that chance

6 because she saw this as a reasonable alternative.

7 Now, they're going to say there ads in the paper

8 down there about Dr. Benowitz's 1983 article,

9 Dr. Benowitz's 1983 article was published, a



newspaper -- written by a newspaper reporter, was published one day in the Salem Statesmen Journal about the time Dr. Benowitz's study came out, and they're going to say, "Well, see, she should have known. We didn't tell her, but he did." One day.

And you know what he said here in this courtroom, remember? He said, "Now, wait a minute. I am a professor at a medical school. I don't have the resources to spread the word about this subject, but Philip Morris does. They've got five billion dollars a year to spend on marketing. Am I the one that's supposed to get the word out?"

Who is to say that Michelle Schwarz even understood the article, even saw the article, was even in town when it came out? If they're going to spend enough money to put The Frank Statement in

Plaintiff's Closing Argument

papers and tell us all how good they're going to be, why not spread the word about low-tar cigarettes? Because they're making too much money off of them. The fraud is making them billions, that's why.

They don't want the word to get out. It's a sales point. They're meeting the health cigarette market. If they really want to get a healthy cigarette, how about cutting down on the tar and nicotine in tobacco? Why is the tobacco all the same?

Why not do like Dr. Farone said, "Deliver a very low-delivery cigarette, and put the nicotine in the filter with some flavorings, so people don't get addicted and cancer." If they want to be addicted, let them be addicted, but don't give them cancer. We know that the cancer without addiction doesn't work because people won't smoke cigarettes without nicotine. They'd still get the cancer if they did.

They only can sell them if they've got nicotine in them, but if you really want to do people a favor, why not get that nicotine down there? Why is it always the same in all the tobacco? It's because they know people won't smoke it if they're not addicted because they smoke for

Plaintiff's Closing Argument

nicotine. We've seen that through hundreds of documents, at least fifty documents.

That's a little bit about the law there. We'll talk more about that later. Well, I am going to move through this a little faster.

What about the proof we offered you and showed you about suppressing research? Exhibit 200, let's talk about real evidence again. This is this document from Dr. Dunn to Dr. Seligman, March 21st, 1980, "The Nicotine Receptor Program. In responding to your inquiry, I am going to first address the more inclusive topic of psychopharmacology of nicotine."

It goes on to say, "The psychopharmacology of nicotine is a highly-vexatious topic. It is where the action is for those doing fundamental research in smoking, and from where most likely will come significant scientific developments profoundly influencing the industry, yet it is where our attorneys least want us to be for two reasons.

59

60

21 "The first one is the oldest and is  
22 implicit in the legal strategy employed over the  
23 years in defending corporations within the industry  
24 from the claims of heirs and estates of deceased  
25 smokers. We within the industry are ignorant of any

Plaintiff's Closing Argument

61

1 relationship between smoking and disease. Within  
2 our laboratories no work is being conducted on  
3 biological systems."

4 We'll see from the evidence that's not  
5 true. They were doing secret research at least part  
6 of the time in Europe at INBIFO.

7 "In research on the pharmacological action  
8 of nicotine" -- excuse me. "But in doing so, we are  
9 engaging in research on the pharmacological action  
10 of nicotine, which brings us to the second concern  
11 of our attorneys." And then it goes on to talk  
12 about concern over FDA regulation, that it's a drug.

13 And then they talk about at the end, "Our  
14 attorneys, however, will likely continue to insist  
15 upon a clandestine," meaning secret, "effort in  
16 order to keep nicotine, the drug, in low profile."  
17 You'll have this exhibit, you can study it. You've  
18 seen it before. I don't want to take more of your  
19 time.

20 How about this document? This is one I  
21 don't think you have seen, 180. Dr. Osdene,  
22 Dr. Seligman, February 16th, 1978. "Reasons why the  
23 Roper study should not be done. An admission by the  
24 industry that excessive cigarette smoking is bad for  
25 you, is tantamount to an admission of guilt with

Plaintiff's Closing Argument

62

1 regard to the lung cancer problem. This could open  
2 the door to legal suits in which the industry would  
3 have no defense."

4 Exhibit 180, and remember Dr. DeNoble. I  
5 almost feel like saying, "Poor Dr. DeNoble," the  
6 fellow that engaged in the rat studies? This  
7 exhibit, Exhibit 234 refers to the paper by DeNoble  
8 five times, the Mele and DeNoble paper. The point  
9 here is the lawyers are deep, way to deep in the  
10 scientific research and what's going on.

11 "Conclusion: Research engaged in as well  
12 as some possibly under consideration by Philip  
13 Morris has undesirable and dangerous implications  
14 for litigation positions the industry takes in  
15 regard to smoking behavior. The pharmacological  
16 nature of the research implies strongly a view of  
17 the importance of nicotine.

18 "What is worse, research reports under  
19 Philip Morris' sponsorship contain claims of  
20 physiological tolerance to nicotine, as well as  
21 claims of unequivocal demonstrations of  
22 reinforcement by nicotine in animals. Tolerance and  
23 reinforcement, as you will recall, are hallmarks of  
24 addiction. This kind of research is a major tool of  
25 our adversaries in the addiction issue.

Plaintiff's Closing Argument

63

1 "The irony is that industry-sponsored  
2 research is honing that tool. In the final  
3 analysis, the performing and publishing of  
4 nicotine-related research clearly seems ill advised  
5 from a litigation point of view." And this is,

6 "Confidential, attorney work product, for use of  
7 counsel only."  
8 Now, there is a couple of important facts  
9 to be seen from this cover letter. This was sent by  
10 Patrick Sirridge who wrote that to Fred Newman. I  
11 want you to go back five and a half weeks.  
12 Dr. Farone is testifying. He's talking about April  
13 '83, and he's saying Fred Newman, the fellow who got  
14 this letter, Shook, Hardy & Bacon, comes down to  
15 Richmond, and says, "We're going to adopt the  
16 ostrich defense." Do you remember that?

17 And Victor DeNoble's laboratory with the  
18 rats is closed down overnight, and Victor DeNoble is  
19 fired. And the lawyer says to Dr. Farone, "We are  
20 going to adopt the ostrich defense." And Dr. Farone  
21 says, "Wait a minute. I've been going around to the  
22 farmers. I've been talking to people in  
23 laboratories and schools. I've been going to the  
24 universities and colleges around here. I've been  
25 telling everybody we know that there is no mystery

Plaintiff's Closing Argument

64

1 that smoking causes cancer and it's addictive."  
2 And Newman says, "We're not doing that  
3 anymore. The ostrich defense, the Cipollone case is  
4 pending, and we're not going to take any more  
5 chances." And within months Dr. Farone is fired.  
6 Dr. DeNoble is fired within a matter of days.

7 If Dr. Farone tells us what the guiding  
8 principle ought to be. I've got five minutes to  
9 talk about this, and then we'll be done, I think.

10 Your Honor, I don't think I can finish  
11 tonight.

12 MR. PHILLIPS: Counsel, can you take that  
13 off for a second. That is not in evidence.

14 MR. WOBBROCK: Well, it was spoken about  
15 by the doctor. I think it is demonstrative, Your  
16 Honor.

17 MR. PHILLIPS: He can read it, but I don't  
18 think it is in evidence, Your Honor.

19 MR. WOBBROCK: It was shown to the jury  
20 multiple times. I don't think it needs to be  
21 offered. It's a demonstrative exhibit.

22 THE COURT: All right. He can use it as a  
23 demonstrative exhibit.

24 Proceed, counsel.

25 MR. WOBBROCK: Thank you.

Plaintiff's Closing Argument

65

1 Dr. Farone talked about the general rule  
2 of product safety for manufacturers. The same piece  
3 of paper I put up before you. He said, "This is the  
4 guiding principle. This is what -- reasonable  
5 care." This is important for what is called the  
6 negligence claim.

7 When conduct is unreasonable, that's what  
8 negligence is. He said, "This is the general rule  
9 of reasonable care under the circumstances. Any  
10 risk of serious injury or death is always  
11 unreasonable and always unacceptable if technically  
12 feasible and economically feasible alternative  
13 designs would reduce or eliminate the risk.

14 I said, "Well, wait a minute. What if you  
15 cannot technically or economically make a safe  
16 cigarette?" And he said, "Well, then you don't stay

17 in the business. You don't sell a product that  
18 kills people, that is unreasonably dangerous." But  
19 he said there was a way, and he talked about the  
20 way.

21 He said you take that Cambridge cigarette,  
22 sure, it's not the best, but it's a safe cigarette.  
23 You put the flavoring in the filter. You put the  
24 nicotine in the filter. You cut the amount of tar  
25 and the particulate matter to the same as you were

Plaintiff's Closing Argument

66

1 walking through a room that had cigarette smoke, a  
2 little bit of cigarette smoke, so people are exposed  
3 to the same risk as they would be in what they call  
4 an ambient environment. And then you'd have a safe  
5 product."

6 If people don't buy it, that's another  
7 problem. But you don't market something that kills  
8 people. Now, that's a different subject than  
9 low-tar cigarettes, but it is what is reasonable  
10 under the circumstances.

11 Nobody has the right to market a Ford  
12 Explorer that flips or Bridgestone Firestone tires  
13 that disintegrate and nobody has the right to market  
14 a product that kills people when used as directed.  
15 Granted, that's a different subject than the fraud  
16 related to low-tar cigarettes, but it's a guiding  
17 principle in this case and it's a guiding principle  
18 in any industry.

19 THE COURT: Counsel, it is so close to  
20 5 o'clock at the end of this piece of argument, so  
21 why don't we stop right here.

22 MR. WOBBROCK: You bet, Your Honor.

23 THE COURT: Members of the jury, leave  
24 your notes in the jury room, don't discuss the case  
25 with anyone. Be back in the jury room at 8:55 a.m.

67

1 We will try to get started as close to 9 o'clock as  
2 we can. Thank you and you are excused.

3 (The following proceedings were held in  
4 open court, out of the presence of the jury at  
5 4:59 p.m.)

6 THE COURT: All right, Counsel, we just  
7 have a few minor things.

8 Did counsel see the voluntary assume duty  
9 instruction, and does the defense agree with the way  
10 that was written? I just received a copy.

11 MR. PHILLIPS: May I take a look at it,  
12 Your Honor?

13 THE COURT: Yes.

14 Ms. Murphy, would you pass this to  
15 counsel.

16 (Discussion between counsel, off the  
17 record.)

18 THE COURT: I was just given one, Elaine  
19 gave it to me, so I don't know when she got it in  
20 her hands. She gave it to me during the closing  
21 arguments.

22 MR. PHILLIPS: I think we have a different  
23 one and I just put that to the side. Let me look at  
24 this one and make sure we're okay. It's just that  
25 things have been moving at a fast pace today, but

68

1 that's not the adopted one.

2 THE COURT: All right.  
3 MR. LANE: I am going to hand Ms. Murphy  
4 two copies of Page 20, get rid of that Page 20 and  
5 stick that Page 20 in there.  
6 THE COURT: That is the final copy of the  
7 jury instruction. Mr. Phillips, have you seen the  
8 final draft of the jury instructions?  
9 MR. PHILLIPS: I think my surrogate has.  
10 THE COURT: All right. If you have  
11 anything tomorrow --  
12 MR. PHILLIPS: I'll look at it tonight.  
13 MR. LANE: As far as plaintiff is  
14 concerned that represents the work of everybody to  
15 the jury instructions.  
16 John, do you want to talk about this? We  
17 do have one remaining issue.  
18 THE COURT: All right. Let's talk about  
19 it just briefly.  
20 MR. LANE: We have a verdict form up this  
21 morning apparently and the verdict form led to a  
22 long discussion about Peterson and Arney. We got  
23 the jury instruction resolved and the Court decided  
24 that there was a no reliance issue involved.  
25 THE COURT: That's correct.

69

1 MR. PHILLIPS: I can't believe you're  
2 saying that, counsel. We're talking about the fraud  
3 count now, Your Honor, okay.  
4 THE COURT: Right.  
5 MR. LANE: Just give it seven seconds.  
6 MR. PHILLIPS: All right. You'd better  
7 start righting the ship quickly here because I don't  
8 like what I hear you saying. And I am going to have  
9 transcript on this if there's any misrepresentation.  
10 Go ahead.  
11 MR. LANE: It's a misrepresentation case.  
12 MR. PHILLIPS: It shouldn't be in the  
13 court.  
14 MR. LANE: This is Question No. 9 and  
15 Question No. 10 that we discussed. Question 9 was  
16 whether there is a voluntary assumed duty, yes or no  
17 resolved that question. And it led you directly to  
18 11, which was one of the false representations in  
19 the complaint. This is Page 4 of the verdict,  
20 Your Honor.  
21 THE COURT: Yes, uh-huh.  
22 MR. LANE: And if it was no, it would go  
23 to 11. If it was yes, you would proceed to Question  
24 No. 10. And our proposed 10 was, "Did Philip Morris  
25 fail to perform its assumed duty by concealing

70

1 research; and, if so, was such concealment a cause  
2 of Michelle Schwarz's death?  
3 MR. PHILLIPS: I want to review this with  
4 the Court.  
5 MR. LANE: I am not finished.  
6 MR. PHILLIPS: All right. Go ahead.  
7 MR. LANE: Mr. Phillips took a look at  
8 that, had some handwritten changes on that. I went  
9 back this afternoon, took the handwritten and  
10 retyped out Question 10, and I've identified now  
11 Page 4 as plaintiff's and Page 4 as defendant's.  
12 We are now looking at Question No. 10 that

13 defendant wrote, handwritten chicken scratch. "Did  
14 Philip Morris fail to perform its assumed duty by  
15 concealing research? Did Michelle Schwarz  
16 reasonably rely upon defendant's performance of its  
17 duty? And duty to disclose is the issue.

18 "And was such failure to perform and  
19 reliance a cause of Michelle Schwarz's death?"  
20 That's what the handwritten --

21 MR. PHILLIPS: That's looks right.

22 MR. LANE: Well, here is the handwritten  
23 scratches. I am trying to do this one piece at a  
24 time.

25 MR. PHILLIPS: I think that's correct.

71

1 MR. LANE: Okay. So there is what the  
2 defendant desires Question 10 to look like.

3 MR. PHILLIPS: Are you done?

4 MR. LANE: No. I just want to have -- it  
5 may be a little difficult for the Court to read, but  
6 the yellow 10 on the bottom of the screen would be  
7 the plaintiff's proposed four. The yellow on the  
8 top, Question 10 would be the defendant's proposed  
9 four.

10 Now, we don't have the reasonable reliance  
11 issue in Question 10, I thought that was the whole  
12 thing that we went through this morning.

13 MR. PHILLIPS: This is unbelievable.

14 MR. LANE: We'll let the record reflect  
15 that Mr. Phillips wandered away, but this is the  
16 desired Question 10 of plaintiff's, and desired  
17 Question 10 of defendant's, and I'll let  
18 Mr. Phillips address the Court.

19 MR. PHILLIPS: Your Honor, I mean, I'm  
20 sorry I am cranky. It's the end of a long day here,  
21 and it's obviously a policy of plaintiff to just --

22 THE COURT: The end of two very long days.

23 MR. PHILLIPS: -- to just ignore what you  
24 told them and then come back and try to reargue it,  
25 and sometimes they're successful so who can blame

72

1 them, but let me go through this -- let me go  
2 through this with Your Honor, and just recite the  
3 record as I recall it, all right?

4 THE COURT: All right.

5 MR. PHILLIPS: We had a lengthy  
6 instruction about the assumed duty claim in the  
7 instruction, which this one is not. This is the one  
8 under fraud, and Mr. Lane extensively argued this  
9 morning. Your Honor, that's why on the negligence  
10 count we don't have to have reliance.

11 Do you have the other instruction here,  
12 the other pages of the special verdict form? This  
13 is just one page. Do you have the other pages?

14 MR. LANE: I can get them.

15 MR. PHILLIPS: I'll proceed. So we had a  
16 long discussion about actually the instruction  
17 relating to special duty on a negligence count, and  
18 Mr. Lane, part of his argument was that's because in  
19 fraud you need reliance, but this is negligence and,  
20 therefore, we don't need to have reliance for the  
21 negligence count.

22 That's why we do have a negligence count  
23 and it doesn't require reliance, Your Honor. And we

24 also have instructions per your direction this  
25 morning that the negligence count and the special

73

1 duty count don't require reliance. For fraud, we've  
2 always required reliance. And Oregon law has always  
3 required reliance.

4 And when you -- you and I had a discussion  
5 Your Honor about why are we having four questions  
6 for fraud, do you recall that? And I didn't like  
7 it, and you didn't accept my arguments, and there we  
8 were. But the last thing I said, Your Honor, was,  
9 "Well, okay. But 10 needs to have the reliance  
10 element because we're going to have four  
11 separate" --

12 THE COURT: And the Court said, "Put the  
13 reliance element in 10."

14 MR. PHILLIPS: Exactly, Your Honor, and  
15 they didn't.

16 MR. LANE: Well, Your Honor, this is what  
17 the proposed instruction --

18 THE COURT: Go ahead. The Court remembers  
19 saying, "Put the reliance in No. 10," I said that.

20 MR. PHILLIPS: That's why I amended it,  
21 because it has to have reliance in it, Your Honor.

22 MR. LANE: Let's go to Question No. 10  
23 then on defendant's verdict. "Did Philip Morris  
24 fail to perform its assumed duty by concealing  
25 research? Did Michelle Schwarz reasonably rely upon

74

1 defendant's performance of his duty? And was such  
2 failure to perform and reliance a cause of Michelle  
3 Schwarz's death?" Is that the Court --

4 THE COURT: Right.

5 MR. LANE: Page 4 will be substituted this  
6 evening in the verdict form.

7 MR. PHILLIPS: Thank you, Your Honor.

8 THE COURT: Very well. Does that complete  
9 it?

10 MR. LANE: I will have a clean verdict  
11 form for the Court in the morning.

12 THE COURT: Why don't you guys go home and  
13 work a while and then get some rest and come back in  
14 the morning at 9:00 o'clock.

15 MR. PHILLIPS: We'll see you in the  
16 morning, Your Honor. Probably another long day  
17 ahead of us.

18 (Court adjourned, Volume 45-C, at 5:10 p.m.)  
19  
20  
21  
22  
23  
24  
25

#### Reporter's Certificate

75

1 REPORTER'S CERTIFICATE  
2 I, Katie Bradford, Official Reporter of  
3 the Circuit Court of the State of Oregon, Fourth  
4 Judicial District, certify that I reported in  
5 stenotype the oral proceedings had upon the hearing  
6 of the above-entitled cause before the HONORABLE  
7 ROOSEVELT ROBINSON, Circuit Judge, on March  
8 14, 2002;

9                   That I have subsequently caused my  
10 stenotype notes, so taken, to be reduced to  
11 computer-aided transcription under my direction; and  
12 that the foregoing transcript, Volume 45-C, Pages 1  
13 through 74, both inclusive, constitutes a full, true  
14 and accurate record of said proceedings, so reported  
15 by me in stenotype as aforesaid.

16                   A transcript without an original signature  
17 and red CSR seal is not certified.

18                   Witness my hand and CSR Seal at Portland,  
19 Oregon, this 23rd day of August, 2002.  
20  
21  
22

---

Katie Bradford, CSR 90-0148  
Official Court Reporter